

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BARRY SLADE,

Petitioner,

v.

RAYMOND MADDEN,

Respondent.

No. 2:21-cv-00464 GGH P

ORDER

Petitioner, a state prisoner proceeding pro se, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner has not, however, filed an in forma pauperis affidavit or paid the required filing fee (\$5.00). See 28 U.S.C. §§ 1914(a); 1915(a). Petitioner will be provided the opportunity to either submit the appropriate affidavit in support of a request to proceed in forma pauperis or submit the appropriate filing fee.

Review of the habeas petition shows petitioner has failed to exhaust state court remedies. In his habeas petition, petitioner attests he presented his claims to the California Court of Appeal, Third Appellate District. ECF No. 1 at 2. However, when asked whether petitioner presented his claims to the highest state court, petitioner states it does not apply. Id. Based on petitioner's contentions, the court finds that petitioner's claims have not been presented to the California Supreme Court. Further, there is no allegation that state court remedies are no longer available to petitioner.

1 The exhaustion of state court remedies is a prerequisite to the granting of a petition for
 2 writ of habeas corpus. 28 U.S.C. § 2254(b)(1). If exhaustion is to be waived, it must be waived
 3 explicitly by respondent's counsel. 28 U.S.C. § 2254(b)(3).¹ A waiver of exhaustion, thus, may
 4 not be implied or inferred. A petitioner satisfies the exhaustion requirement by providing the
 5 highest state court with a full and fair opportunity to consider all claims before presenting them to
 6 the federal court. Picard v. Connor, 404 U.S. 270, 276 (1971); Middleton v. Cupp, 768 F.2d
 7 1083, 1086 (9th Cir. 1985), cert. denied, 478 U.S. 1021 (1986).

8 After reviewing the petition for habeas corpus, the court finds that petitioner has failed to
 9 exhaust state court remedies. The claims have not been presented to the California Supreme
 10 Court. However, "a district court has the discretion to stay and hold in abeyance fully
 11 unexhausted petitioners under the circumstances set forth in Rhines." Mena v. Long, 813 F.3d
 12 907, 912 (9th Cir. 2016) (citing Rhines v. Weber, 544 U.S. 269 (2005)). Accordingly, the
 13 undersigned will provide petitioner an opportunity to move for a stay under Mena and Rhines.

14 A district court may properly stay a habeas petition and hold it in abeyance pursuant to
 15 Rhines v. Weber, 544 U.S. 269 (2005). See King v. Ryan, 564 F.3d 1133, 1135 (9th Cir. 2009).
 16 Under Rhines, a district court may stay a mixed petition to allow a petitioner to present an
 17 unexhausted claim to the state courts. Rhines, 544 U.S. at 277. Assuming the petition itself has
 18 been timely filed, such a stay "eliminates entirely any limitations issue with regard to the
 19 originally unexhausted claims, as the claims remain pending in federal court[.]" King, 564 F.3d at
 20 1140. A petitioner qualifies for a stay under Rhines so long as (1) good cause is shown for a
 21 failure to have first exhausted the claims in state court; (2) the claim or claims at issue potentially
 22 have merit; and (3) there has been no indication that petitioner has been intentionally dilatory in
 23 pursuing the litigation. Rhines, 544 U.S. at 277-78. Although good cause does not require
 24 "extraordinary circumstances," courts must "interpret whether a petitioner has 'good cause' for a
 25 failure to exhaust in light of the Supreme Court's instruction in Rhines that the district court
 26 should only stay mixed petitions in 'limited circumstances.'" Wooten v. Kirkland, 540 F.3d 1019,

27 1 A petition may be denied on the merits without exhaustion of state court remedies. 28
 28 U.S.C. § 2254(b)(2).

1 1024 (9th Cir. 2008) (quoting Jackson v. Roe, 425 F.3d 654, 661-62 (9th Cir. 2005)). The Ninth
2 Circuit has further rejected a “broad interpretation of ‘good cause.’” Wooten, 540 F.3d at 1024.
3 Instead, “good cause turns on whether the petitioner can set forth a reasonable excuse, supported
4 by sufficient evidence, to justify that failure.” Blake v. Baker, 745 F.3d 977, 982 (9th Cir. 2014).

5 Pursuant to Rhines, petitioner will be granted an opportunity to file a motion for stay and
6 abeyance in which he sets forth good cause for failure to exhaust his claims prior to filing his
7 current federal habeas petition; that is unexhausted claims are meritorious; and that he has not
8 been dilatory in proceeding on his claims.

9 Accordingly, IT IS HEREBY ORDERED that:

10 1. Petitioner shall submit, within thirty days from the date of this order, an affidavit in
11 support of his request to proceed in forma pauperis or the appropriate filing fee; petitioner’s
12 failure to comply with this order will result in the dismissal of this action;

13 2. The Clerk of the Court is directed to send petitioner a copy of the in forma pauperis
14 form used by this district for pro se petitioners; and

15 3. Petitioner shall have thirty days to file a motion for stay and abeyance. Petitioner is
16 warned that failure to file a motion for stay and abeyance within the court’s deadline will result in
17 a recommendation that this action be dismissed as unexhausted.

18 Dated: April 20, 2021

19 /s/ Gregory G. Hollows
20 UNITED STATES MAGISTRATE JUDGE
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